

CONSTITUTIONALIZATION AND THE INTERNATIONAL CRIMINAL COURT: WHITHER INDIVIDUAL CRIMINAL LIABILITY FOR AGGRESSION?

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INTRODUCTION: THE UNFINISHED BUSINESS OF INTERNATIONAL CRIMINAL COURT JURISDICTION OVER THE CRIME OF AGGRESSION

The Rome Statute of the International Criminal Court¹ provides for the inclusion of the crime of aggression within the Court's jurisdiction,² but the Statute needs to be amended to include a definition of aggression as well as conditions for the exercise of jurisdiction by the International Criminal Court.³ This contribution argues that the creation of the International Criminal Court provides the international community with an historic opportunity to establish effective jurisdiction over the crime of aggression. The debate about the definition of aggression involves a number of important issues and perspectives: First, the criminal-justice perspective to aggression (as embodied by the supporters of International Criminal Court jurisdiction over the crime of aggression) has implications for the collective security system (embodied by the United Nations Charter). Secondly, there seems to be a latent tension between the *idealism* of international criminal law and the *realism* of international politics. It is submitted that a *constitutionalist* perspective on these developments might help to put the debate in its proper context, namely an attempt to advance the common good of international peace and security through multiple means, and on a rational footing.

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¹ Rome Statute of the International Criminal Court (1998) UN Doc A/CONF 183/9, (1998) 37 *ILM* 999, referred to below as the 'Rome Statute'.

² Article 5(1).

³ Article 5(2).

INTERNATIONAL CRIMINAL LAW IN CONSTITUTIONALIST PERSPECTIVE

Supporters of the International Criminal Court are often labelled 'idealists' because power 'is wished away' and too much confidence is placed in legal mechanisms to address massive human rights abuses and other atrocities. The realist critique seems to be that legal mechanisms are employed by idealists to resolve 'essentially political problems'.⁴ There is arguably no international law problem more political⁵ than the debate about whether, and if so, how to provide for the crime of aggression in the Rome Statute of the International Criminal Court. This debate is about more than a legal-technical process to define aggression — it concerns in essence a debate about the proper role of international (criminal) law in the contemporary international system.

One way of looking at the system of international criminal law is to view it as a reaction of the international community to atrocities.⁶ This must be seen in context: States are (still) the primary actors in the international system, but the constitutionalist notion of an international community (or, *civitas maxima*)⁷ entails that this international community is governed by norms, not power.⁸ It means that the international system (traditionally anarchist, where states — in the absence of an overarching sovereign — acted in their own interest and where the exercise of state power was central)⁹ is moving towards the supra-national limitation of state power.¹⁰ The United Nations

⁴ Stephen D Krasner 'Realist views of international law' 2002 *American Society of International Law, Proceedings* 267.

⁵ See for instance Marten Zwanenburg 'The statute for an international criminal court and the United States: Peacekeepers under fire?' (1999) 10 *European Journal of International Law* 124 for an overview of some of the political and substantive concerns regarding the jurisdiction of the International Criminal Court.

⁶ Antonio Cassese *International Criminal Law* (2003) 3–14.

⁷ This concept of 'international community' can be traced to the publicist Christian Wolff (1749) who employed the notion of *civitas maxima* to demonstrate the rule of law and communitarian attributes underlying the international community. See further Anne Peters 'There is nothing more practical than a good theory: An overview of contemporary approaches to international law' (2001) 44 *German Yearbook of International Law* 25 at 35.

⁸ See Wouter Werner 'Constitutionalisation, fragmentation, politicization, the constitutionalisation of international law as a Janus-faced phenomenon' (2007) 8 *Griffin's View on International and Comparative Law* 17 at 18–23.

⁹ David Caron pointed out that the condition of anarchy is (still) a basic feature of international relations. David D Caron 'Framing political theory of international courts and tribunals: Reflections at the Centennial' 2006 *American Society of International Law, Proceedings* 56.

¹⁰ Neo-Marxists would argue that the constitutionalization of international law is a step in the direction of a new empire. See for instance Michael Hardt & Antonio Negri *Empire* (2000) 9–10: 'The transition we are witnessing today from traditional international law, which was defined by contracts and treaties, to the definition and constitution of a new sovereign, supranational world power (and thus to an imperial notion of right), however incomplete, gives us a framework in which to read the totalizing social processes of Empire. In effect, the juridical transformation functions

Charter has been described as a 'constitutional' limitation on the power of sovereign states, thus regulating the exercise of state power, notably the use of armed force by states. The International Criminal Court has also been described as such a 'constitutional' development,¹¹ albeit not limiting, but rather complementing¹² the exercise of national jurisdiction over the most serious crimes under international law.¹³

The International Criminal Court is perhaps in a position to limit the sovereignty of states party to the Rome Statute of the International Criminal Court in the sense that it can influence state behaviour and policy, for instance with respect to human rights practices.¹⁴ In this context the international community should be viewed as more than a political community; it is also a legal community. It is a community characterized by norms such as the desire to act in the common good, and by actions to advance the collective interest. This (essentially constitutionalist) view of the international community also emphasizes the importance of certain fundamental values, especially 'super-norms' like *jus cogens* obligations — for instance the prohibition of the use of force by states.¹⁵

THE CRIMINAL-JUSTICE RESPONSE TO INTERNATIONAL ATROCITIES

The criminal-justice reaction to international atrocities (epitomized by the establishment of international criminal tribunals)¹⁶ is prompted in part by the failure of other measures (for instance diplomatic and economic sanctions) to stop or prevent atrocities like genocide, crimes against humanity, war crimes, and indeed aggression. In terms of the criminal justice response, various modalities exist to address the atrocities that affect the whole of humankind. Antonio Cassese identified the following modalities: the exercise by national

as a symptom of the modifications of the material biopolitical constitution of our societies. These changes regard not only international law and international relations but also the internal power relations of each country. . . [In] Empire there is peace, in Empire there is the guarantee of justice for all peoples.'

¹¹ See Werner op cit note 8 at 27.

¹² Under the principle of complementarity, the International Criminal Court will only exercise jurisdiction over a matter if a state party is either unwilling or unable to prosecute. For detailed analysis see in general Jann K Kleffner & Gerben Kor (eds) *Complementarity in the Rome Statute and National Criminal Jurisdiction* (2007).

¹³ War crimes, crimes against humanity and genocide. The International Criminal Court also has jurisdiction over the crime of aggression, but on condition that a suitable definition and conditions for the exercise of jurisdiction can be agreed upon by the states parties to the Rome Statute.

¹⁴ For more on this argument, see Gustavo Gallón 'The International Criminal Court and the challenge of deterrence' in Dinah Shelton (ed) *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (2000) 93–104, in particular at 103–4.

¹⁵ See in general Peters op cit note 7 at 35.

¹⁶ Including the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the Former Yugoslavia, and the Special Court for Sierra Leone.

courts of jurisdiction over offences on grounds of territoriality or nationality; the exercise by national courts of extraterritorial jurisdiction (the latter possibly being the result of obligations in terms of the *aut dedere, aut judicare*¹⁷ enforcement model in international criminal law); the establishment of truth commissions to complement traditional criminal-justice responses to atrocities; and the establishment of international criminal tribunals.¹⁸ An essential precondition for the functioning of the last-mentioned modality is the notion of individual criminal liability for crimes under international law.

The main purpose of traditional international law is the regulation of the relations between states. The historic prosecution of individuals for crimes under international law in the post-Second World War international criminal tribunals at Nuremberg and Tokyo can be seen as the confirmation of the separateness of international criminal law from classic (public) international law:¹⁹ individuals are the subjects²⁰ of international criminal law, and individuals can be held liable for crimes under international law.

The establishment of effective individual criminal liability for the crime of aggression (indeed the genesis of the criminalization of aggression) proved to be politically controversial legal processes.²¹

¹⁷ Many international instruments contain this model of enforcement of international criminal law. It imposes on states parties the duty to either 'extradite or prosecute' individuals responsible for crimes under international law. Hugo Grotius used the term *aut dedere aut punire*, but this was in 1973 reformulated by Cherif Bassiouni to '*aut dedere aut judicare*', in order to emphasize the judicial process in the form of a trial that is necessary to determine criminal culpability. See Cherif M Bassiouni *International Criminal Law* 2 ed vol I (1999) 5.

¹⁸ Cassese *op cit* note 6 at 6–14.

¹⁹ Kriangsak Kittichaisaree *International Criminal Law* (2001) 9. Lyal Sunga wrote that the term international criminal law 'is accurate only if used in any one of three senses: 1) to refer to the accumulation of international legal norms on individual criminal responsibility (without implying that they form a coherent system); 2) to refer to international criminal law as an incipient field of international law currently in a stage of emergence (without implying that it already exists as a relatively self-sufficient or autonomous system); or 3) to refer to the decisions, law and procedure of a permanent international criminal court'. See Lyal S Sunga *The Emerging System of International Criminal Law — Developments in Codification and Implementation* (1997) 7. In my view, international criminal law has (especially after the adoption of the Rome Statute of the International Criminal Court in 1998) indeed emerged as a separate system in all three respects as identified by Sunga.

²⁰ Cherif Bassiouni (ed) *The Protection of Human Rights in the Administration of Criminal Justice* (1994) xxiv; Gerhard Werle *Principles of International Criminal Law* (2005) 35.

²¹ On the historic criminalization of aggression ('crimes against peace'), see Telford Taylor 'The Nuremberg trials' (1955) 55 *Columbia LR* 488; Franz B Schick 'Crimes against peace' (1948) 38 *Journal of Criminal Law and Criminology* 445; Jonathan A Bush 'The Supreme . . . Crime' and its origins: The lost legislative history of the crime of aggressive war' (2002) 102 *Columbia LR* 2324.

THE CRIMINALIZATION OF INTERNATIONAL AGGRESSION

The customary-law status of aggression as a crime under international law (at least as it pertains to wars of aggression) is regarded by prominent publicists to be quite well-established.²² This status of the crime of aggression has its roots in the post-Second World War international criminal tribunals at Nuremberg and Tokyo. Neither of the statutes that established the historic post-war international criminal tribunals defined aggression.²³ However, looking at the Nuremberg and Tokyo judgments, one can say that both the political and legal conditions were optimum for their success in convicting individuals for the crime of aggression (in the form of ‘crimes against the peace’).²⁴ It is certainly possible to criticize the Nuremberg and Tokyo processes as having been ‘victors’ justice’ — and the dogmatic and jurisprudential critique against the ex post facto criminalization of aggression at Nuremberg is well-known.²⁵ What is important, however, is that the processes at Nuremberg (and later Tokyo) were, everything considered, successful in ensuring that peace was established, not through political convenience, but at least with the help of a judicial process. These ad hoc tribunals represented important milestones on the long road to end impunity for crimes of international concern. For instance, the Nuremberg Principles²⁶ (adopted in 1950), were, generally speaking, more than just an attempt to preserve the jurisprudential legacy of Nuremberg.²⁷ In many ways the work of the International Law Commission in this regard served as an impetus to keep many of the ideals of international criminal law alive — the most important of which was the ideal of a permanent international criminal court with jurisdiction over the core international crimes.²⁸

Since the post-Second World War trials in Germany and Japan, there has been no prosecution of an individual for this supreme international crime. This state of affairs prevails despite the fact that aggression is regarded as a

²² Werle op cit note 20 at 390–1; Cassese op cit note 6 at 112–13.

²³ See the Charter of the International Military Tribunal at Nuremberg (1945) UN Treaty Series, vol 82, 279; and the Charter of the International Military Tribunal for the Far East at Tokyo (1946) Special Proc by the Supreme Commander for the Allied Powers, as amended 26 April 1946, TIAS No 1589.

²⁴ For an analysis of this crime, see Leo Gross ‘The criminality of aggressive war’ (1947) 41 *The American Political Science Review* 205.

²⁵ For more on this, see Hans Leonhardt ‘The Nuremberg trial: A legal analysis’ (1949) 11 *The Review of Politics* 449.

²⁶ Nuremberg Principles, Geneva, 19 Jul 1950, UNGAOR, 5th Session, Supp No 12, UN Doc A/1316 (1950), reproduced in Christine van den Wyngaert (ed) *International Criminal Law: A Collection of European and International Instruments* (2005) 319–20.

²⁷ For a discussion of the impact of the Nuremberg Principles in various domestic legal contexts, see Gary Komarow ‘Individual responsibility under international law: The Nuremberg Principles in domestic legal systems’ (1980) 29 *International & Comparative LQ* 21.

²⁸ See Sir Arthur Watts *The International Law Commission 1949–1998* vol III (1999) 1658.

crime under customary international law, as indicated above. There are also a number of states that criminalize aggression (in some or other form) under their domestic law.²⁹

The absence of prosecutions of individuals for the crime of aggression was not due to a lack of wars (civil or international) in the decades following the Second World War. Indeed, even the period of the Cold War was characterized by conflicts and the use of armed force by states, often in prima facie contravention of the prohibition of the use of force provided for in the United Nations Charter.³⁰ The lack of prosecutions should not be seen as a reflection on the normative legacy of Nuremberg. This legacy provided the legal and normative context of many attempts to build on the jurisprudence of Nuremberg (and Tokyo). These attempts were primarily aimed at keeping alive the ideal of an international criminal court with jurisdiction over the most serious crimes under international law, notably aggression, war crimes, crimes against humanity, and genocide. The United Nations and the International Law Commission, as well as numerous specialist organizations, scholars and human rights organizations, worked on various proposals to create a permanent international criminal court, and to define or codify the most serious crimes. Some early successes, like the adoption of the Genocide Convention of 1948,³¹ provided hope that the 'legacy of Nuremberg' (in the sense that individuals responsible for the worst international crimes should not go unpunished) would live on. The General Assembly of the United Nations — arguably the entity which is most representative of the 'international community' — adopted the Nuremberg Principles in 1950.³² These Principles confirmed the notion of individual criminal liability for the most serious crimes under international law, and in particular the crimes tried at Nuremberg (crimes against peace, war crimes, and crimes against

²⁹ For instance Germany. The Code of Crimes against International Law of 2002 (Völkerstrafgesetzbuch — VStGB) provides for the incorporation of international crimes into German criminal law. The VStGB does not include the crime of aggression, which is understandable, since the VStGB is aimed at bringing German criminal law in line with the Rome Statute (which does not yet provide for a definition of aggression). However, s 80 of the German Criminal Code (Strafgesetzbuch — StGB) provides for the crime of 'preparation of aggressive war'. This crime is subject to extraterritorial jurisdiction. If the act of preparation of aggressive war (within the meaning of s 80 StGB) occurred in a foreign state, German courts would be able to exercise extraterritorial jurisdiction over the crime. See in general Helmut Satzger 'German criminal law and the Rome Statute — A critical analysis of the New German Code of Crimes against International Law' (2002) 2 *International Criminal LR* 261–82; Heinrich Wilhelm Laufhütte in Burkhard Jähnke, Heinrich Wilhelm Laufhütte & Walter Odersky *Strafgesetzbuch — Leipziger Kommentar* 4 ed (2005) 1–30.

³⁰ For instance the Iran/Iraq war during the 1980s and the Soviet invasion of Afghanistan in 1979.

³¹ Convention on the Prevention and Suppression of the Crime of Genocide (1948) *UN Treaty Series* vol 78, 227.

³² Nuremberg Principles, 29 July 1950, UNGAOR 5th Session, Supp No 12, UN Doc A/1316 (1950), reproduced in Van den Wyngaert op cit note 26 at 319.

humanity). The Genocide Convention, the Nuremberg Principles, and the four Geneva Conventions adopted in 1949,³³ indicated that the international community wanted to keep the legacy of Nuremberg alive, and to expand the scope of individual criminal liability for international crimes.

Aggression proved to be the most contentious of the four 'core crimes', referred to above. While the United Nations Charter reflected (especially in art 2(4)) the commitment of the international community to end the use of force by states as a means to settle disputes or to further the national interest, neither this charter nor any other international legal instrument provided for a definition of aggression. It was only in 1974 that the United Nations General Assembly adopted a so-called 'consensus' definition of aggression,³⁴ but this text was drafted with state responsibility (and not individual criminal liability) in mind.³⁵

From the early 1950s to 1996 the International Law Commission attempted to define aggression for purposes of individual criminal liability, but these attempts proved to be unsuccessful.³⁶

The end of the Cold War did not result in global peace, but it provided the international community with an opportunity to react more decisively (and beyond the political restrictions of the Cold War) to threats to international peace and security. The establishment, in the last decade of the twentieth century, of two ad hoc international criminal tribunals by the Security Council to deal with massive human rights violations in the Former Yugoslavia and in Rwanda provided the essential political and legal impetus for the formation of a permanent international criminal court.³⁷ The fusion

³³ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I) (1949) UN Treaty Series, vol 75, 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II) (1949) UN Treaty Series, vol 75, 85; Convention Relative to the Treatment of Prisoners of War (Geneva Convention III) (1949) UN Treaty Series, vol 75, 135; Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) (1949) UN Treaty Series, vol 75, 287.

³⁴ Definition of Aggression, GA Res 3314 (xxix), 29 UN GAOR Supp No 31, 142 UN Doc A/9631 (1974), reproduced in Van den Wyngaert op cit note 26 at 357.

³⁵ For a critical assessment, see Julius Stone 'Hopes and loopholes in the 1974 definition of aggression' (1977) 71 *American Journal of International Law* 224. On the usefulness of the definition from an international criminal-law perspective, see Justin Hogan-Doran & Bibi T van Ginkel 'Aggression as a crime under international law and the prosecution of individuals by the proposed International Criminal Court' (1996) 43 *Netherlands International LR* 321, in particular at 336.

³⁶ See in general Timothy LH McCormack & Gerry J Simpson 'The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind: An appraisal of the substantive provisions' (1994) 5 *Criminal Law Forum* 1; John Murphy 'Commentaries on the Draft Code of Crimes' (1993) 11 *Nouvelles Études Pénales* 209 (excerpts reprinted in Cherif Bassiouni *International Criminal Law* 2 ed vol I (1999) 338–40).

³⁷ Bruce Broomhall *International Justice and the International Criminal Court — Between Sovereignty and the Rule of Law* (2003) 9–10.

of political and criminal-justice responses to mass atrocities that shocked the conscience of the world and threatened international peace and security, provided a paradigm conducive to a more effective approach to the core crimes under international law. In this spirit the Rome Statute of the International Criminal Court was adopted in July 1998, signalling a hopeful end to a bloody century.

The Rome Statute establishes a permanent International Criminal Court to try individuals responsible for the most serious crimes under international law, namely war crimes, crimes against humanity and genocide. This statute also includes aggression as a crime within the court's jurisdiction, but the International Criminal Court can only exercise jurisdiction over the crime after the adoption of a definition and conditions for the exercise of jurisdiction. The 'supreme international crime' proved too contentious for direct and immediate inclusion in the Rome Statute. Article 5(2) of the Rome Statute provides as follows:

'The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the United Nations.'

The historic criminalization of aggression occurred in the aftermath of the Second World War and in the context of the international community's efforts to outlaw the use of force by states. The development of the *jus ad bellum* — today best described as the *jus contra bellum*³⁸ — represents one of the salient features of the international political and legal system. The prohibition of the use of force by states is one of the highest norms of the international legal system.³⁹ This system, of which collective security⁴⁰ forms a key characteristic, provides the institutional context for the continuing debates surrounding the various efforts to build on the post-Second World War prosecutions of individuals for the crime of aggression. The various efforts to define and codify the crime of aggression for purposes of individual criminal liability are fundamentally informed by the historical, institutional and normative factors referred to above.

The historical attempts to define and codify the crime of aggression are also analysed in the context of the evolving *system* of international criminal law. This system is characterized by national and international efforts to end

³⁸ On the development of the *jus contra bellum* (and its relevance for contemporary international law) see Johan van der Vyver 'Ius contra bellum and American foreign policy' (2003) 28 *South African Yearbook of International Law* 1.

³⁹ See in general George Barrie 'Forcible intervention and international law: Legal theory and realities' (1999) 116 *SALJ* 791; Alexander Orakhelashvili *Peremptory Norms in International Law* (2006) 50–1.

⁴⁰ In the collective security context an important fusion of politics and law can be seen. It is simply not possible to draw clear lines between 'political' and 'legal' responses to threats to international peace and security. See Erika de Wet *The Chapter VII Powers of the United Nations Security Council* (2004) 133–5.

impunity for the worst crimes affecting the international community as a whole, notably the core crimes. This evolving system comprises efforts to establish national criminal jurisdiction over the core crimes. In order to complement this, states party to the permanent International Criminal Court are obliged to provide for the necessary domestic legal mechanisms that would make it possible for such states effectively to co-operate with the International Criminal Court. To this end, the complementary jurisdiction of the International Criminal Court ensures that, where a state party to the Rome Statute is either unwilling or unable to prosecute an individual or individuals responsible for one or more of the crimes within the court's jurisdiction, the International Criminal Court can try the case.⁴¹

THE CRIMINALIZATION OF AGGRESSION AND STATE SOVEREIGNTY

State sovereignty (states exercising exclusive power over their territories) has been the organizing principle of the modern international political and legal system since at least the Peace of Westphalia of 1648 (in terms of the Treaties of Osnabrück and Münster).⁴² These treaties, which ended the Thirty Years' War between Sweden, France and Germany, not only confirmed the concept of sovereign states as the organizing principle of the international system, but also provided for the enforcement of the peace treaties. Leo Gross has pointed out that Europe therefore received 'an international constitution, which gave to all its adherents the right of intervention to enforce its engagements'.⁴³ Thus, the treaties were more than mere confirmations of state sovereignty, or of peace between two or more sovereign states: the treaties came to represent the first attempt to create a 'constitutional' order in an international system dominated by sovereign states. In this sense, the Peace of Westphalia can be considered as an important precursor⁴⁴ to the international system of sovereign states, governed by the principles of collective security contained in the Charter of the United Nations.

The Charter of the United Nations provides that this organization 'is based on the principle of the sovereign equality of all its Members'.⁴⁵ This principle forms the basis of modern public international law and is also 'the fundamental premise on which all international relations rest'.⁴⁶ The United Nations Charter confirms the Westphalian notion of sovereignty as a

⁴¹ See para 10 of the Preamble, and art 17 of the Rome Statute. See further Sharon Williams 'Issues of admissibility' in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) 383–94; Kleffner & Kor op cit note 12.

⁴² For an historical overview, see Leo Gross 'The Peace of Westphalia, 1648–1948' (1948) 42 *American Journal of International Law* 20.

⁴³ Ibid at 24.

⁴⁴ Ibid at 20.

⁴⁵ Charter of the United Nations, art 2(1).

⁴⁶ Antonio Cassese *International Law* 2 ed (2005) 48.

foundation of the international system, and protects the legal equality between states.⁴⁷ The principle of non-intervention and the prohibition of the threat or use of force are two features of the international system that are closely associated with the concept of sovereignty. These notions, however, are not static. The dynamics of collective security, the constitutionalization of the international system, and the normative impact of human rights are some of the factors that shape the content and scope of 'state sovereignty', 'non-intervention', and the 'prohibition of the threat or use of force'. 'Sovereignty', 'territorial integrity', and 'political independence' of states are also protected interests in the context of the criminalization of international aggression.⁴⁸

Although the 'sovereign equality of states' can be regarded as the *raison d'être* of the present international system, the normative impact of human rights and the evolving system of international criminal law are changing the meaning and scope of 'sovereignty'. The recognition of the notion of individual criminal liability for crimes under international law, and the creation of international criminal tribunals to try individuals responsible for these crimes, marked a fundamental departure from the traditional (Westphalian) notion of sovereignty. Bruce Broomhall has put it as follows:

'The idea that sovereignty does not arise in a vacuum, but is constituted by the recognition of the international community, which makes its recognition conditional on certain standards, has become increasingly accepted in the fields of international law and international relations. Such limits are held always to have been imposed by the community on the recognition of its members, but to be subject to development over time. From this perspective, crimes under international law can be understood as a formal limit to a State's legitimate exercise of its sovereignty, and so in principle justify a range of international responses (subject to the rest of international law, including that relating to the use of force).'⁴⁹

It is submitted that the constitutionalization of the international system and the system of collective security, as well as the evolving legal and political processes within this paradigm, are important for the development of an effective dispensation regarding the question of individual criminal liability for aggression. The interrelationship between the principal organs of the collective security system and the institutions and processes of the evolving system of international criminal law, is of fundamental importance to this issue.

DEFINING AGGRESSION

Historically, different schools of thought on the possibility and desirability of defining aggression (for purposes of individual criminal liability) can be

⁴⁷ Ibid.

⁴⁸ See for instance Draft Code of Crimes against the Peace and Security of Mankind (1991), art 15(2), and United Nations General Assembly Definition of Aggression (1974), art 1.

⁴⁹ Broomhall op cit note 37 at 43.

identified. Julius Stone, one of the prominent exponents of the 'sceptical school', supported the criticism that a definition would provide a 'trap for the innocent and a signpost for the guilty'.⁵⁰ This school of thought opposed attempts to define aggression, regardless of whether a 'general definition' approach or 'enumerative' approach was taken. These sceptical voices were also informed by a desire not to restrict the functions of international bodies (notably the Security Council) in determining or identifying the occurrence of aggression.⁵¹ Ian Brownlie, a proponent of attempts to define aggression, stated the following about the requirements for a definition of aggression:

'Definition must involve generalization and employ elements which require further definition. It may also be said that no definition is "automatic", since the organ concerned must necessarily apply any criteria to particular facts. Particularly dubious is the argument that a criminal may take advantage of a precise definition; one might assume instead that he would welcome the absence of a definition.'⁵²

The problem, according to Brownlie, was that since the Nuremberg trials and the creation of the new United Nations-dominated collective security system, 'the quest for a definition of aggression' became a 'vast law-making project with many facets'.⁵³ From being originally a military concept, it became much more of a legal concept after the First World War. While the Nuremberg Tribunal (and certainly the subsequent proceedings in occupied Germany) interpreted and applied aggression rather narrowly (concentrating on 'waging a war of aggression'),⁵⁴ the attempts to define aggression in the post-Second World War era concerned a number of state policies that might have an impact on the interests of other states — thus making the 'law-making project' much more comprehensive, but less focused and certainly, in the end, less successful.⁵⁵ The concept of aggression was no longer limited to the use of armed force, but concepts like 'economic aggression'⁵⁶ and 'indirect aggression' (states acting vicariously)⁵⁷ were also entertained and played a role in the different drafting processes and debates on a suitable definition for aggression.

⁵⁰ Julius Stone (1958) as quoted in Ian Brownlie *International Law and the Use of Force by States* (1963) 355. Echoes of this scepticism can also be found in the debate about American opposition to the International Criminal Court, particularly in the context of the process of drafting a definition for the crime of aggression. For some of these arguments, see W Nash 'The ICC and the deployment of US armed forces' in Sarah B Sewall & Carl Kaysen *The United States and the International Criminal Court* (2000) 153–64.

⁵¹ Brownlie op cit note 50 at 355.

⁵² Ibid at 356.

⁵³ Ibid.

⁵⁴ International Military Tribunal (Nuremberg) Judgment (1946) IMT 171 at 186.

⁵⁵ Brownlie op cit note 50 at 356.

⁵⁶ Stone op cit note 35 at 230–1.

⁵⁷ Stone op cit note 35 at 237–9.

ANOTHER STEP IN THE 'VAST LAW-MAKING PROJECT': THE ROME STATUTE AND THE CRIME OF AGGRESSION

Not all the delegates to the Rome Diplomatic Conference on the establishment of an International Criminal Court were in favour of the inclusion of aggression as a crime within the jurisdiction of the International Criminal Court. Many delegates regarded the crime of aggression as essentially a crime committed by states, not individuals. Other delegates regarded aggression as too 'political' a concept, not susceptible to legal definition. Some delegates were also concerned that the paramount role of the Security Council in matters of international peace and security would be eroded by the inclusion of aggression in the Rome Statute.⁵⁸

At the Rome Conference two opposing views emerged on the inclusion of the crime of aggression in the Statute of the International Criminal Court. These two blocs were much more intransigent in their respective points of view than the delegations at the meetings that preceded the Rome Conference. On the role of the Security Council, many states, but especially those from the Non-Alignment Movement, wanted an absolutely independent court with no role for the Security Council. This included no role for the Security Council regarding the crime of aggression. Directly in opposition to this were many western states and Russia who wanted a central role for the Security Council. Indeed, the permanent members of the Security Council persisted in their view that the role of the Security Council is an absolute condition for the inclusion of the crime of aggression in the Statute.⁵⁹

The present art 5(2) of the Rome Statute is a reflection of the proposal by the Non-Alignment Movement, but there is also an important nod in the direction of those states who favour a role for the Security Council in cases of aggression. Article 5(2) provides that any future definition of aggression 'shall be consistent with the relevant provisions of the Charter of the United Nations'. Some commentators see this as an indication that the language of art 5(2) provides for some threshold of Security Council involvement.⁶⁰

The final text of the Statute of the International Criminal Court adopted at Rome reflects a compromise between the delegations opposed to and those in favour of the inclusion of aggression. It also reflects some of the concerns of many of the delegations regarding the conditions under which the International Criminal Court should exercise its jurisdiction, as well as

⁵⁸ See in general 'Summary Records of the 1998 Diplomatic Conference' in Cherif Bassiouni *The Legislative History of the International Criminal Court* vol 3 (2005) 127–382.

⁵⁹ Roy S K Lee (ed) *The International Criminal Court — The Making of the Rome Statute* (1999) 84.

⁶⁰ D Sarooshi 'Aspects of the relationship between the International Criminal Court and the United Nations' (2001) 32 *Netherlands Yearbook of International Law* 27 at 43–4; Daryl A Mundis 'The Assembly of States Parties and the institutional framework of the International Criminal Court' (2003) 97 *American Journal of International Law* 132.

the role of the Security Council in terms of its Chapter VII powers (to maintain international peace and security).

In Michael Reisman's opinion the Security Council is assigned the task of restoring and maintaining peace and order and this necessarily imports a 'broad competence to engage in a contextual appreciation of whether to characterize certain uses of force as aggression'.⁶¹ On the other hand, according to Reisman, a criminal-law approach 'is not charged with world order concerns and does not admit a comparable contextual appreciation'.⁶²

In my view, the political approach (that is basically the collective-security approach, dominated by the Security Council) differs in substance, methodology and outcome from the criminal-justice response to international aggression. The question is whether these approaches can co-exist (or even complement each other) within a single definition and enforcement mechanism for the crime of aggression under the Statute of the International Criminal Court.

Indeed, art 5(2) of the Rome Statute reflects a compromise reached at the Diplomatic Conference in 1998. Underlying art 5(2) is the tension between the political and criminal-justice approaches. The definition of aggression in the strict sense (the elements of the crime) and the issue of the relationship between the jurisdiction of the International Criminal Court over the crime of aggression and the powers of the Security Council stemming from art 39 of the United Nations Charter, are all interdependent.⁶³

THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION

A review conference on the Rome Statute of the International Criminal Court is due to be held in 2009 or 2010. This event will present the Assembly of States Parties with the opportunity to amend the Rome Statute, including any progress made on the definition of aggression and the conditions under which the International Criminal Court could exercise its jurisdiction with respect to aggression, as prompted by art 5(2) of the Rome Statute.

It is the task of the special working group to discuss proposals for a provision on aggression. These discussions have already produced many discussion documents with different options and models on both the definition of aggression and the conditions of exercising of jurisdiction by the International Criminal Court.⁶⁴

⁶¹ W Michael Reisman 'Introduction: The definition of aggression and the ICC' 2002 *American Society of International Law, Proceedings* 181.

⁶² Ibid.

⁶³ See further Phani Dascalopoulou-Livada 'The crime of aggression: Making operative the jurisdiction of the ICC — Tendencies in the PrepCom' 2002 *American Society of International Law, Proceedings* 185.

⁶⁴ For background see 'Press conference by chairman of working group on crime of aggression' 31 Jan 2007 (available at www.un.org/News/briefings/docs/2007/070131_Wenaweser.doc.htm).

(a) Aggression as a 'leadership crime'

The ongoing technical and diplomatic processes to find a suitable definition of aggression for purposes of inclusion in the Rome Statute require a critical and prognostic approach in terms of the various reports of the Assembly of States Parties to the Rome Statute. The approach with the broadest support thus far seems to be the so-called 'differentiated approach' to the definition of aggression. In terms of the conduct of the individual, this approach provides for direct perpetration, co-perpetration and perpetration by means. In addition, it provides for the criminal responsibility of individuals who order, solicit, or induce the crime of aggression (whether it occurs in fact or is attempted). The forms of criminal responsibility that emanate from art 25(3)(b) of the Rome Statute are quite distinct. The first form of responsibility in this context is for a perpetrator by means. As Kai Ambos noted, '[a] person who orders a crime is not a mere accomplice but rather a perpetrator by means, using a subordinate to commit the crime.'⁶⁵ In this sense art 25(3)(b) actually complements art 28 of the Rome Statute, which provides for command responsibility. However, in the case of aggression, the preferred approach seems to be that art 28 (responsibility of commanders and other superiors) should *not* apply. This makes sense, because the nature of the crime of aggression is such that it is really inconceivable that members of the military (who are normally not in a position to direct the political or military apparatus of the state) can commit the crime of aggression, for which their superiors will then (on the basis of art 28) be held responsible.⁶⁶

The preferred variant of the definition of aggression further provides for responsibility on the basis of aiding, abetting and assistance. In the context of aggression, the meaning and application of the words 'providing the means for its commission' (as per art 25(3)(c)) could have far-reaching consequences for individuals who are not necessarily political or military leaders. In this regard the historical examples of the so-called Nuremberg industrialists'

⁶⁵ Kai Ambos 'Individual criminal responsibility' in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) 480. See further *Prosecutor v Jean Paul Akayesu*, Case No ICTR-96-4-T, 2 Sept 1998, para 483: 'By ordering the commission of one of the crimes . . . a person also incurs individual criminal responsibility. Ordering implies a superior-subordinate relationship between the person giving the order and the one executing it. In other words, the person in a position of authority uses it to convince another to commit an offence. In certain legal systems, including that of Rwanda, ordering is a form of complicity through instructions given to the direct perpetrator of an offence. Regarding the position of authority, the Chamber considers that sometimes it can be just a question of fact.' For further comment on this case, see William Schabas in André Klip & Göran Sluiter (eds) *Annotated Leading Cases of International Criminal Tribunals Student Ed* (2005) 427–42.

⁶⁶ Despite wide agreement in the special working group that art 28 should not apply to the crime of aggression, there was disagreement on whether the non-applicability needs to be specified or not. See Assembly of States Parties, Resumed Fifth Session, Discussion Paper on the Crime of Aggression proposed by the Chairman (16 Jan 2007), Annex, ICC-ASP/5/SWGCA/2 (available at www.icc-cpi.int/asp).

prosecutions⁶⁷ could hold lessons for the criminal liability of individuals for the crime of aggression under the Rome Statute. Although the prosecutions of a number of rich industrialists sympathetic to the Nazi regime's aggressive foreign policy were not successful as far as the charges relating to aggression were concerned, the implications for possible future prosecutions of individuals who made an aggressive war effort possible (through resources or other forms of assistance) should be considered. Allison Marston Danner noted the following:

'International prosecutors contemplating bringing charges of aggression against corporate officers will have to consider the Nuremberg precedents carefully. They must assess whether the political climate and legal understanding of aggression has changed sufficiently in the past sixty years to garner a different result than that recorded in the earlier cases.'⁶⁸

The subjective element contained in art 25(3)(c) of the Rome Statute — 'for the purpose of facilitating' — means that the accomplice (the individual aiding or abetting) must have special knowledge about the circumstances in which the assistance is taking place. This formulation goes further than the *mens rea* requirement in terms of art 30 of the Rome Statute. Indeed, this seems to be a 'specific subjective requirement stricter than mere knowledge'.⁶⁹ The notion that an individual should be held liable for his or her contribution to the criminal conduct lies at the heart of the general principles of individual criminal responsibility as provided for in art 25 of the Rome Statute. In my view, the emphasis on aggression as a 'leadership crime' best reflects the historical legacies of Nuremberg and Tokyo. However, it is prudent to note that 'leadership' is often a complex notion. Thus it is submitted that the criminalization of forms of criminal liability such as incitement or common purpose (as per art 25(3) of the Rome Statute) best reflects the complexities of leadership and the structures that often make leadership (and decision-making) effective. Viewed from the constitutionalist perspective, one can see how the criminalization of the decision to go to war (and possibly the policy-making that preceded it) represents a limitation on sovereignty. More than a general international-law limitation (notably in terms of the United Nations Charter regime) on the 'sovereign power of the state'⁷⁰ to go to war, the criminalization of aggressive war provides a further limitation (a chilling effect) on the policy decisions of the leadership of the sovereign state.

⁶⁷ For a discussion of the implications of these post-second World War prosecutions, see Allison Marston Danner 'The Nuremberg industrialist prosecutions and aggressive war' (2006) 46 *Virginia Journal of International Law* 651.

⁶⁸ *Ibid* at 676.

⁶⁹ Ambos *op cit* note 65 at 483.

⁷⁰ The classical proponents of the 'just war' theory argued that '[monarchs] and those who command the sovereign power of the state are assigned exclusive responsibility for recourse to aggressive war, that is, for matters of *jus ad bellum*, whereas the responsibility of soldiers is limited to the use of proper methods of fighting and other issues of *jus in bello*'. See David Rodin *War & Self-Defense* (2003) 167.

(b) The act of aggression and the conduct of the state

The proposed art 8bis to be included in the Rome Statute provides not only for the conduct and liability of the individual, but also for the required state conduct.⁷¹ The report of the special working group on the crime of aggression noted that 'broad support' was expressed for the term 'act of aggression'. This term is also used in art 39 of the United Nations Charter and was furthermore elaborated on in the General Assembly definition of aggression of 1974.⁷² The special working group regarded the use of the term 'act of aggression' as a well-established term (with some Security Council resolutions⁷³ on 'acts of aggression' to help guide interpretation in this regard).

It was noted in the report of the special working group that, although the term 'armed attack' was linked to the concept of self-defence under art 51 of the United Nations Charter, it lacked a specific definition. It was not defined in the Charter or in other international instruments.⁷⁴ There is also a difference in wording between art 2(4) and art 51 of the Charter. While the latter refers to 'armed attack', art 2(4) refers to the broader concept of 'threat or use of force'. The conceptual differences led Albrecht Randelzhofer to the following conclusion:

'[Any] state affected by another state's unlawful use of force not reaching the threshold of an 'armed attack', is bound, if not exactly to endure the violation, then at least to respond only by means falling short of the use or threat of force, which are thus often totally ineffective. This at first sight unacceptable result is undoubtedly intended by the Charter, since the unilateral use of force is meant to be excluded as far as possible. Until an armed attack occurs, states are expected to renounce forcible self-defence . . . Only if and when the prohibited use of force rises to an armed attack can the state concerned resort to forcible measures for its defence.'⁷⁵

The difference between the two notions does make sense in terms of the general aim of the United Nations Charter to discourage the use of force by states. In terms of the criminalization of aggression, the view was expressed in the special working group that 'the notion of "armed attack" should be retained as it reflected the idea that only [the] gravest violations of the United

⁷¹ Paras 1 and 2 of the special working group's proposed art 8bis.

⁷² Art 3 of the General Assembly Definition of Aggression. Art 4 provides that the acts listed in art 3 'are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter'.

⁷³ Resolutions like these can be regarded as evidence of the international community's views on state action that amounts to 'acts of aggression'. See for instance UN SC Res 387 of 31 Mar 1976, Res 577 of 6 Dec 1985 ('acts of aggression' by South Africa against Angola); UN SC Res 527 of 15 Dec 1982 ('premeditated aggressive act' by South Africa against Lesotho); UN SC Res 568 of 21 Jun 1985 ('acts of aggression' by South Africa against Botswana).

⁷⁴ Report of the Special Working Group para 14.

⁷⁵ Albrecht Randelzhofer 'Article 51' in Bruno Simma et al (eds) *The Charter of the United Nations — A Commentary* 2 ed vol I (2002) 790.

Nations Charter are covered by the crime of aggression'.⁷⁶ This view is also consistent with the commentary of the International Law Commission⁷⁷ on art 16 of the 1996 Draft Code of Crimes against Peace and Security of Mankind.⁷⁸ The conduct of the state will thus have to be of a serious nature. This could be a violation of art 2(4) of the United Nations Charter or conduct that constitutes 'a sufficiently serious violation of an international obligation'.⁷⁹

The report of the special working group reflects the general view that the conduct of the state will in essence be 'the use of armed force'⁸⁰ and will in all probability be an act listed in art 3 of the General Assembly definition of aggression of 1974. That list is not exhaustive and 'the Security Council may determine that other acts constitute aggression under the provisions of the Charter'.⁸¹

The nature or object and the result of the act of the state were further contentious issues that the special working group had to consider. These issues essentially concern the nature of the act of aggression or the armed attack (in terms of the proposed art 8*bis* para 1 to be included in the Rome Statute). There seemed to be broad support for a threshold provision that refers to the 'manifest violation of the Charter of the United Nations'. This threshold should also be linked with the well-established notion of a 'war of aggression', which was the term used by the Nuremberg Tribunal.⁸² The supporters of this 'threshold of seriousness' wanted to exclude 'borderline' cases from the jurisdiction of the International Criminal Court.⁸³

Article 1 of the Rome Statute of the International Criminal Court also makes reference to the inherent limitation of the jurisdiction of the International Criminal Court to 'the most serious crimes of international concern'. It is submitted that the threshold contained in the above-mentioned proposal before the special working group on the crime of aggression, provides an important context and should be retained since it is consistent with the nature of the crime of aggression as a crime against the peace and security of mankind. The jurisdictional threshold provided for in the Rome Statute must be seen in the context of the collective security framework of the United Nations Charter. This would provide the proper threshold to determine whether state conduct is serious enough to be

⁷⁶ Report of the Special Working Group para 15.

⁷⁷ Watts op cit note 28 at 1739; Sunga op cit note 19 at 13–14.

⁷⁸ Draft Code of Crimes against the Peace and Security of Mankind, 5 Jul 1996, *Yearbook of the ILC* 1996 vol II (2), reprinted in Van den Wyngaert op cit note 26 at 331.

⁷⁹ Watts op cit note 28 at 1739.

⁸⁰ See art 1 of the UN General Assembly Definition of Aggression (1974).

⁸¹ Art 4 of the UN General Assembly Definition of Aggression (1974).

⁸² Nuremberg Judgment supra note 54 (counts one and two on the war of aggression).

⁸³ Report of the Special Working Group para 16.

regarded as an act of aggression. Apart from this, one should also be mindful of the envisaged role of the Security Council, which is considered below.

(c) Conditions for the exercise of jurisdiction by the International Criminal Court: The role of the Security Council

The Report of the special working group on the crime of aggression noted the following:

‘Divergent views were expressed as to whether the exercise of jurisdiction over the crime of aggression should require a prior determination of the State act of aggression by the Security Council, and on the consequences of the absence of such determination. A view was expressed that in either case the [International Criminal Court] would benefit from the authority of the Security Council as there would be political backing for the Court’s investigation of situations.’⁸⁴

Paragraph 4 of the special working group’s proposed definition (art 8bis) provides for Security Council involvement in cases of aggression before the International Criminal Court. The text of the proposed para 4 reflects the fine balance between an independent International Criminal Court and the traditional role of the Security Council in matters concerning international peace and security. According to this proposal, before the prosecutor can proceed with an investigation into a possible case of aggression, ‘the Court shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned.’ If such a determination exists, the International Criminal Court ‘shall notify the Security Council of the situation before the Court’.

Article 13(b) of the Rome Statute might provide a procedural avenue for Security Council determinations of state acts of aggression, thus playing a role in the process of International Criminal Court jurisdiction over the crime of aggression. Article 13 provides as follows:

‘The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;⁸⁵
- (b) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) the Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.’

⁸⁴ Report of the Special Working Group para 23.

⁸⁵ Article 14 provides as follows: ‘1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes. 2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.’

The fact that a referral of a situation by the Security Council is one of the so-called 'trigger mechanisms' of the International Criminal Court, must be seen in context. Where cases are referred to the prosecutor in terms of art 13(a) or where the prosecutor initiates an investigation *proprio motu* in terms of art 13(c), state acceptance is a precondition for the exercise of jurisdiction by the International Criminal Court.⁸⁶ The trigger mechanism provided for in art 13(b) was one of the controversial issues before and during the Rome Diplomatic Conference on the International Criminal Court in 1998. While the majority of delegations were in favour of a referral role for the Security Council, there was a small minority of delegations which argued that this holds the potential for political abuse. In particular, these delegations were worried that the permanent five members of the Security Council could use their veto to stop referrals of situations where they, their allies or their interests were involved or affected.⁸⁷ These concerns were ultimately rejected in favour of the inclusion of the present art 13(b).

The independence of the International Criminal Court is of paramount importance. Too many layers of conditions for the exercise of its jurisdiction will probably undermine the International Criminal Court's independence (and effectiveness). However, a clear role for the Security Council should be accepted as one of the conditions for the exercise of jurisdiction. More to the point: the Security Council has an important political role to play — also where aggression is concerned. It is the responsibility of the Security Council to maintain international peace and security. At the same time the independent role of the International Criminal Court (which is not an organ of the United Nations) as the primary criminal-justice response to international atrocities must be respected and encouraged. Any proposal that a prior determination of aggression by the Security Council must be a prerequisite to the International Criminal Court's hearing of the case cannot be supported. There needs to be a balance between an independent International Criminal Court and the role of the Security Council in international affairs.

The mechanism provided for in art 16 of the Rome Statute is an important nod in the direction of the political structures of the international system. Under art 16, the Security Council can request the International Criminal Court to defer a case, on the basis that the trial is, for instance, hampering efforts to restore international peace after the outbreak of hostilities. This political check on the criminal-justice process is a reflection of the important theme of collective security in international affairs. No criminal-justice response to aggression can proceed without acknowledging the role of the institutions of collective security. At the same time, the prosecutor must be in a position to determine (independently) whether there

⁸⁶ See also art 12(2) of the Rome Statute.

⁸⁷ See in general Sharon Williams 'Article 13 — Exercise of jurisdiction' in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) 349.

is enough evidence to proceed with a case against an individual. The prosecutor must be in a position to make up his own mind. The political processes and decisions of the Security Council should not serve as absolute jurisdictional facts on which the prosecutor must rely. Establishing an independent role for the prosecutor is not in conflict with art 5(2) of the Rome Statute. This article provides that any future provision on the crime of aggression 'shall be consistent with the relevant provisions of the Charter of the United Nations'. The fact that the International Criminal Court may defer cases on request of the Security Council (in the context of Security Council action on matters concerning international peace and security) is evidence of the Court's role as promoter of not only international justice but also of international peace and security, in line with the aims of the United Nations Charter.

There is no contradiction in providing for a political role for the Security Council (and other organs of the United Nations), while insisting on an independent criminal-justice response to aggression. Both strategies represent important goals of the twentieth century: collective security and the evolving system of international criminal law as a quest to end impunity for the worst crimes under international law. Both strategies stem from the historical reaction of the international community to the two world wars — a reaction that led to the formation of the United Nations (as primary embodiment of collective security) and the evolving system of international criminal law. The latter involved the formation of various *ad hoc* international criminal tribunals, so-called 'mixed' or 'hybrid' tribunals, and ultimately the International Criminal Court.

The debate about the role of the Security Council in relation to the crime of aggression is, it would seem, more about procedure than substantive criminal law. The proposed art 8*bis* of the Rome Statute (on the definition of aggression) should contain only the elements of the crime of aggression. Additions to this article of essentially procedural (and political/institutional) matters — such as, for instance, the role of the prosecutor vis-à-vis the Security Council — would cloud the definition of aggression. This, in turn, could affect the precision or clarity of meaning expected from a criminalization provision. These institutional and procedural aspects are best dealt with in a separate provision.

CONCLUDING REMARKS

War and lesser forms of aggression affect the stability of the international legal and political order. Apart from these rather abstract-sounding interests that are negatively affected by war, the reality is that aggression also affects the lives of individuals. Collective security, one of the key features of the international system, was developed to discourage the use of armed force in ways not provided for in the principal international instruments, notably the UN Charter.

The criminal-justice response to aggression is still underdeveloped. The *almost* universal non-criminalization of aggression at national level (and the

concomitant lack of prosecutions) must be understood in the light of multiple constitutional, doctrinal and political reasons; and the process to define aggression for purposes of the Rome Statute provides a very realistic opportunity for states to reassess their views of and responses to aggression. Rhetoric and the intricacies of diplomacy aside, the time seems ripe for a realistic and effective regulation of individual criminal liability for the crime of aggression to take shape.

As we have seen, art 5(2) of the Rome Statute prompted the Assembly of States Parties to establish a special working group to draft a definition of aggression and conditions for the exercise of jurisdiction of the International Criminal Court over the crime of aggression. Article 5(2) is structured on both the criminal justice and collective security approaches to aggression. It is argued here that, more than a 'compromise text', art 5(2) is indeed one of the key pointers in the Rome Statute that reflects this multilateral treaty's constitutionalist traits. The developing system of international criminal law thus contributes to an international system characterized by the limitation of state power (and the unlawful use of armed force by states).